Supreme Court, U.S.
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No. 99-256

IN THE
SUPREME COURT OF THE UNITED STATES

B. WILLIS, C.P.A., INC.,
Petitioner,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA, an Oklahoma corporation; BURLINGTON NORTHERN and SANTA FE RAILWAY COMPANY, a foreign corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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FACTUAL BACKGROUND

Respondents make a number of false representations concerning the facts of this case.

A. Respondents falsely assert that PSO argued and the state district court held that Willis had the burden of proof to vitiate the taking (Pg. 2 & 20). In truth, "PSO contended that discovery for the landowner was irrelevant. It argued that..Willis had no right to contest the taking of his land. The trial court held in favor of PSO..." App. M at 44a, ¶5.

B. Respondents falsely assert that possession of Willis' property was not appealed or addressed by the Oklahoma Supreme Court (Pg. 3). In truth, the Oklahoma Supreme Court explicitly held PSO's possession unconstitutional in ¶1 and further addressed possession in ¶6. (App. M at 43a, 45a) In a subsequent decision the Oklahoma Court of Civil Appeals acknowledged the "Supreme Court held the owner was entitled to discovery and a meaningful opportunity for a hearing **BEFORE PSO COULD...OCCUPY THE PROPERTY.**" (App. N at 54a, emphasis added).

C. Respondents falsely assert in Note 7 on Page 6 that Willis has not sought relief against BN under §1983. Willis brought §1983 claims against BN by virtue of a Motion for Summary Judgement which is independent of and does not rest on the complaint. Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 106 S.Ct. 2505 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986).

ARGUMENT 1

THERE IS A PROCEDURAL DUE PROCESS RIGHT TO A PREDEPRIVATION HEARING ON PUBLIC USE WHEN A PRIVATE CONDEMNOR FILES CONDEMNATION PROCEEDINGS IN STATE COURT AGAINST PRIVATE PROPERTY.

On Page 13 of their brief respondents assert, "Willis' position was rejected by this Court long ago." Cited as authority are Bragg v. Weaver, 251 U.S. 57 (1919), Government of Virgin Islands v. 19.623 acres of land, 536 F.2d 566 (3rd Cir. 1976) and Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Tex. 1974) aff'd 419 U.S. 1042 (1974). None of these cases furnish support for the position asserted by respondents.

This Court has long made a clear distinction between the legislative issues of necessity and extent of taking and the judicial issue of public use.

"It is well settled that while the question whether the purpose of a taking is a **public one is judicial**...the necessity and the proper extent of a taking is a legislative question." Sears v. City of Akron, 246 U.S. 242, 248, 38 S.Ct. 245 (1918) (emphasis added). See also Rindge Co. v. Los Angeles County, 262 U.S. 700, 43 S.Ct. 689 (1923).

In Bragg v. Weaver, supra at 58 this Court specifically noted that the judicial issue of public use was not at issue:

> "It is conceded that the taking is under the direction of public officers and is for a public

use; •••Hence no discussion of these matters is required."

Government of Virgin Islands v. 19.623 acres of land, supra, is equally irrelevant to the case at bar. In that case the Government of the Virgin Islands sought to condemn land for a public highway. The landowner challenged not public use but rather the legislative issue of necessity. The 3rd Circuit Court of Appeals held quite correctly that the land owner had no procedural due process right to a predeprivation hearing on the legislative issue of necessity.

In neither case, however, is there a holding that there is no procedural due process right to a predeprivation hearing on the judicial issue of public use, the claim here asserted by Willis.

Likewise, Joiner v. City of Dallas, supra is misrepresented by respondents. In Joiner, a lawsuit was brought by landowners seeking to block a condemnation action by the City of Dallas. The landowners alleged a wide variety of constitutional infirmities in Texas eminent domain procedures including that it was a denial of due process to permit a condemnor to take possession without a predeprivation hearing on necessity and the extent of taking. The District Court disposed of these claims on the grounds that necessity and extent of taking were legislative issues.

With respect to the judicial issue of public use, the Court found the Texas scheme constitutional because a landowner could receive a predeprivation hearing on public use. "Condemnation, however, is for the general public - a criteria easily tested in the District Court before a loss of possession..." Joiner at 774.

In fact, Joiner v. City of Dallas, supra, utterly fails to support respondents for three (3) reasons. First, with regard to public use, the issue in Joiner was whether it was constitutional to require the landowner, in order to obtain a predeprivation hearing on public use, to file a second lawsuit in the State District Court after the condemnation proceedings were filed in the County Court. Oklahoma abolished county courts years ago, and all proceedings are conducted in the State District Court. In Oklahoma, to obtain a predeprivation hearing on public use, the landowner is not required to file a collateral lawsuit or seek an injunction. All a landowner must do in Oklahoma is file Exceptions to the Report of Commissioners challenging the right to take as Willis did. PSO v. Willis, 941 P.2d 995 (Ok. 1997) App. M at 49a, ¶17.

Second, in Joiner the landowners challenged the constitutionality of the Texas eminent domain scheme. In the case at bar, the constitutional violations occurred not because the Oklahoma eminent domain scheme is unconstitutional, but because PSO failed to comply with it.

Lastly, Joiner is largely irrelevant because the District Court clearly limited its holdings to governmental entities, noting that "We do not have an allegation that the power of eminent domain has been delegated to a private corporation..." Joiner at 774 N.20

In the case at bar, the condemnor is a private profit making corporation which hurriedly constructed a railroad in violation of both Oklahoma eminent domain law and federal railroad law (49 U.S.C. §10901) to provide BN single direct line service into PSO's plant after BN caught PSO breaching their contract by shipping coal into the plant on Union Pacific. Public Service Company of Oklahoma v. Burlington Northern Railroad Company, 53 F.3d 1090 (10th Cir. 1995).

ARGUMENT 2

WILLIS' TRESPASS AND §1983 CLAIMS ARE RIPE FOR ADJUDICATION ON THE MERITS.

Respondents argue that "All of Willis' constitutional claims arise out of the state court eminent domain proceeding." (Pg. 21) They further argue that "...the remainder of Willis' claims relating to the actual adjudication of the taking issue itself by the Oklahoma Courts clearly are not ripe until there is a final decision by the Oklahoma Courts on the right to take issue...the outcome of which have a direct impact on the plaintiffs' federal claims."(Pg. 22)

To justify these assertions both the Court of Appeals and respondents rely exclusively on cases dealing with "regulatory takings" resulting from the application of government regulations or administrative decisions.

Willis' claims primarily derive not from the state eminent domain proceedings themselves but from the fact both PSO and BN have physically invaded Willis' property without complying with the constitutional requirements established by both this Court and the Oklahoma Supreme Court.

This Court has long made clear and major distinctions between "regulatory takings" and actual physical invasions. Yee v. City of Escondido, California, 503 U.S. 519, 112 S.Ct. 1522 (1992); Loretto v. Teleprompter Manhattan C.A.T.V. Corp., 458 U.S. 419, 102 S.Ct. 3164, (1982); Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383 (1979).

The decision of the Court of Appeals reflects a complete refusal to follow those cases and make that distinction.

The decision of the Oklahoma Supreme Court (App. M at 41a) clearly establishes that Willis did not get the process due, the protection of the law afforded similarly situated landowners or adequate, effective and meaningful access to the court to defend its property.

As this Court noted in both Soldal v. Cook County, 506 U.S. 56 at 70, 113 S.Ct. 538 at 548 (1992) and U.S. v. James Daniel Good Real Property, 510 U.S. 43 at 49, 50, 114 S.Ct. 492 at 499 (1993), "When such multiple violations are alleged we are not in the habit of identifying as a preliminary matter the claims' dominant character. Rather, we examine each constitutional provision in turn."

Future proceedings in the state condemnation action are irrelevant. As this Court noted in Good Real Property, 510 U.S. at 62, 114 S.Ct. at 505 (1993), "The question before us is the legality of the seizure not the strength of the governments' case."

In Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 983, this Court held that when substantive violations of constitutional rights occur, "the constitutional violation actionable under §1983 is complete when the wrongful action is taken."

ARGUMENT 3

THE COURT OF APPEALS HAS REFUSED TO FOLLOW STATE LAW AS PRONOUNCED BY THE OKLAHOMA SUPREME COURT.

Respondents falsely assert that Willis' argument is not that the Court of Appeals refused to follow state law on a state law question but rather misapplied state law. On Pages 24 and 29 of the Petition for Certiorari, Willis clearly argues that the Court of Appeals has refused to follow state law as pronounced by the Oklahoma Supreme Court.

On Page 29 of their brief respondents assert, "The Court of Appeals properly interpreted Oklahoma law, and properly determined that Oklahoma law did not support Willis' claims that either the Oklahoma eminent domain procedures are invalid or that Willis was deprived of its rights under Oklahoma eminent domain law."

Willis does not claim that Oklahoma's eminent domain procedures are invalid but rather that PSO failed to comply with them. Interpreting Oklahoma law is not the province of the Court of Appeals but rather the Oklahoma Supreme Court which did so in PSO v. Willis, supra and found that Willis was deprived of its rights under Oklahoma law. See App. M at 41a.

Respondents falsely assert that Oklahoma eminent domain law is a "somewhat confusing body of state court precedent". There is nothing confusing about the body of state court precedent. See PSO v. Willis, supra, App. M at 41a.

In 1935 the Oklahoma Supreme Court noted, "Condemnation procedure in this state is thus governed by statutes, which under a logical interpretation, contain no provisions authorizing a determination of questions relating to the right to condemn." Wrightsman v. Southwestern Natural Gas. Co., 46 P.2d 925, 930 (Ok. 1935). Finding that landowners had a constitutional right to a "tribunal in which to test the right to condemn prior to possession" (Wrightsman at 929) the Oklahoma Supreme Court exercised its power of judicial construction to establish that the procedure to obtain a predeprivation hearing on public use was to raise the issue in the Exceptions to Report of Commissioners. The Court explicitly rejected the concept of requiring the landowner to seek injunctive relief. Wrightsman at 930.

In Town of Ames v. Wybrandt, 220 P.2d 693 (Ok. 1930), the Oklahoma Supreme Court reconciled the obvious conflict between Wrightsman and what the Court of Appeals described as "the legislative authorization of immediate possession." The Oklahoma Supreme Court held that 66 O.S. ¶53(c) did not apply while the right to take was at issue. The fourth syllabus by the Oklahoma Supreme Court in Town of Ames states:

> 4. In a condemnation proceeding where the right to condemn is properly in issue it would be a denial of equal protection of the laws to authorize possession before there has been a determination of the right to condemn.

Syllabus is the law of the case in Oklahoma. Sampson Construction Co. Inc. v. Farmers Coop El. Co., Marshall, Okla., 382 F.2d 645 (10th Cir. 1967). Syllabus adopted by the Oklahoma Supreme Court is the law of the State of Oklahoma until overruled. Hartford Acc. & Indem. Co. v.

First Nat. Bk. & Tr. Co. of Tulsa, 287 F.2d 69 (10th Cir. 1961).

In 1997 in PSO v. Willis, supra, the Oklahoma Supreme Court reiterated the entire body of state court precedent in one clean, concise, comprehensive, easy to read decision. See App. M at 41a.

Oklahoma eminent domain law is "somewhat confusing" only to a practicing attorney whose practice is based on peddling political influence rather than a rudimentary knowledge of Oklahoma eminent domain law. See App. M at 46a, ¶9.

Willis is not misrepresenting the extent of the Oklahoma Supreme Court's decision. Rather Willis is confronted with the very situation described by Justice Frankfurter in Snowden v. Hughes, 321 U.S. 1, 16, 64 S.Ct. 397, 405 (1944):

> And if the highest court of a state should candidly deny to one litigant a rule of law which it concededly would apply to all other litigants in similar situations, could it escape condemnation as an unjust discrimination and therefore a denial of the equal protection of the laws?

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